

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

**LAWRENCE M. REUBEN
ROBYN WILLSON HATTAWAY**
Law Offices of Lawrence M. Reuben
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**WILLIAM R. RICHARDS
KATHRYN A. STARKS**
William R. Richards P.C.
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MARIE POLLARD,)
)
Appellant-Plaintiff,)
)
vs.) No. 49A02-0612-CV-1119
)
LUKE OGDEN,)
)
Appellee-Defendant.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cale J. Bradford, Judge
The Honorable Burnett Caudill, Magistrate
Cause No. 49D01-0406-CT-1162

June 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Marie Pollard (“Pollard”) appeals the denial of her motion to correct error, which challenged the trial court’s refusal to grant her Indiana Trial Rule 60(B) motion to set aside a judgment of dismissal obtained by Appellee-Defendant Luke Ogden (“Ogden”) upon Pollard’s promissory estoppel claim. We affirm.

Issue

Pollard presents a single issue for review: whether the trial court abused its discretion by refusing to set aside the dismissal because Ogden procured the dismissal through fraud, misrepresentation, or misconduct.

Facts and Procedural History

On June 22, 2004, Pollard filed a complaint against Ogden. Pollard filed an amended complaint on December 10, 2004, which Ogden moved to dismiss.¹ On May 18, 2005, the trial court dismissed Pollard’s constructive fraud claim but refused to dismiss her promissory estoppel claim. The parties were ordered to mediation.

On August 11, 2005, the parties entered into a “Mediation Agreement” providing in pertinent part as follows:

Defendant shall pay the Plaintiff \$5,000.00 as full settlement for all claims, \$2,500, within 30 days, \$2,500 within 120 days from the dates [sic] of this Agreement.

The parties shall sign an Agreed Judgment Entry for \$10,000.00 to be held by Plaintiff’s Attorney but not filed unless payments are not made when due.

¹ Neither complaint is included with the Record on Appeal.

(App. 39.) On September 12, 2004, Pollard's attorney Patrick O'Brien ("O'Brien") issued a letter to Ogden, advising that payment had not been received, and requesting execution of the Agreed Judgment Entry. On September 14, 2004, O'Brien received Ogden's check dated September 9, 2004, via Federal Express delivery.²

On December 7, 2004, Ogden tendered a second payment of \$2,500.00 and requested that O'Brien prepare an "Agreement to Dismiss with Prejudice." (Def. Ex. B.) On December 27, 2004, O'Brien advised William Richards, Pollard's attorney, that he no longer represented Pollard, but had forwarded the December payment to her.

On December 30, 2005, Ogden filed his Motion to Dismiss with Prejudice. In pertinent part, Ogden advised the trial court:

The Agreement required that Ogden tender certain sums to Pollard in exchange for which Pollard agreed to settle this case.

Said sums have been tendered.

(App. 12.) On January 27, 2006, Pollard's new attorney, Lawrence Reuben, returned the two checks to Ogden's attorney, with a demand letter for the execution of the Agreed Judgment Entry for \$10,000.00. In turn, Ogden's attorney sent the checks back to Pollard's attorney.

On January 30, 2006, the trial court conducted a hearing at which Ogden appeared and Pollard did not appear. The trial court granted Ogden's Motion to Dismiss with Prejudice.

On June 12, 2006, Pollard filed her "Motion to Set Aside Order on Motion to Dismiss with Prejudice and Motion for the Entry of Judgment." (App. 18.) Therein, Pollard alleged that Ogden "neglected to say that he was to 'tender certain sums to' the Plaintiff within

certain periods of time.” (App. 18.) She advised the trial court that Ogden had made his first payment on September 14, 2005, as opposed to September 12, 2005 as agreed upon. She further advised the trial court that Ogden had not signed the Agreed Judgment Entry, and requested a judgment in the amount of \$10,000.00.

On July 31, 2006, the trial court conducted a hearing upon Pollard’s motion to set aside the dismissal, at which counsel for both parties appeared. On September 12, 2006, the trial court entered an order denying “the motion to set aside the Court’s December 30, 2005 [sic] order of dismissal.” (App. 9.) On October 12, 2006, Pollard filed a Motion to Correct Error. On October 23, 2006, the trial court denied the Motion to Correct Error. Pollard now appeals.

Discussion and Decision

Pollard contends that the trial court abused its discretion by refusing to set aside the judgment of dismissal. More specifically, she contends “the trial court failed to recognize that Ogden’s counsel deliberately misled the Court to induce it to enter the Order on Motion to Dismiss with Prejudice on January 30, 2006, by intentionally misstating in his Motion to Dismiss with Prejudice filed on December 29, 2005, that he, Ogden, had complied with the terms of the Mediation Agreement when he had not.” Appellant’s Brief at 8.

A dismissal with prejudice is a dismissal on the merits, and may be set aside by the court for the grounds and in accordance with the provisions of Indiana Trial Rule 60(B). E & S Mems, L.L.C. v. Eagen, 795 N.E.2d 508, 510 (Ind. Ct. App. 2003). This Rule affords relief in extraordinary circumstances, which are not the result of any fault or negligence on

² Ogden testified that he delivered the check to his attorney on “the actual date, September ninth.” (Tr. 30.)

the part of the movant. Whitaker v. St. Joseph's Hosp., 415 N.E.2d 737, 744 n.6 (Ind. Ct. App. 1981). A T.R. 60(B) motion is addressed to the equitable discretion of the trial court, circumscribed by the eight categories listed in T.R. 60, and the burden is on the movant to establish grounds for relief. Ind. Ins. Co. v. Ins. Co. of N. Am., 734 N.E.2d 276, 278 (Ind. Ct. App. 2000), trans. denied. The movant filing a motion for reasons (1), (2), (3), (4), or (8) must also allege a meritorious claim or defense. Hoosier Health Sys., Inc. v. St. Francis Hosp. & Health Centers, 796 N.E.2d 383, 386 (Ind. Ct. App. 2003).

Pollard's motion for reinstatement of her claim was apparently premised upon Trial Rule 60(B)(3), which provides:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]

The evidentiary burden for a successful Trial Rule 60(B)(3) motion was recently explained in Outback Steakhouse of Florida, Inc. v. Markley, 856 N.E.2d 65 (Ind. 2006). Trial Rule 60(B)(3) creates a limited exception to the general rule of finality of judgments, enabling a court to grant relief from an otherwise final judgment due to fraud, misrepresentation, or misconduct of an adverse party. Id. at 72-73. "Misconduct" under this Rule can be based on either unintentional or intentional conduct. Id. at 73. In order to prevail upon her allegation of misconduct, Pollard is required to show: (1) Ogden committed either fraud, negligent misrepresentation, or misconduct; (2) the fraud, misrepresentation, or misconduct prevented Pollard from fully and fairly presenting her case; and (3) Pollard has made a prima facie showing of a meritorious claim. See id. at 74.

We decline to hold that Ogden's representation of payment in full is fraudulent, a misrepresentation, or misconduct. The sums due under the mediation agreement had been tendered. In Pollard's view, Ogden's tender of the first payment to his attorney was not adequate compliance, and the date of receipt in her attorney's office should have been controlling. Thus, the provisions of the Agreed Judgment Entry for \$10,000.00 would have been invoked. It is undisputed that Pollard did not fully present her case to the trial court before the dismissal. This is not, however, attributable to Ogden's allegedly deficient motion, but rather to Pollard's failure to appear.

Once Ogden advised the trial court that the sums agreed upon in mediation had been tendered, it would then have been incumbent upon Pollard to point out that the first tender was arguably two days late and Ogden was thus liable to pay \$10,000.00. Pollard was not present to do so. Nor did she seek relief pursuant to Trial Rule 60(B)(1) by presenting a claim of mistake, surprise, or excusable neglect. Rather, she chose to allege misconduct pursuant to Trial Rule 60(B)(3), but is unable to satisfy her requisite burden of proof.

The trial court did not abuse its discretion by denying Pollard equitable relief.

Affirmed.

SHARPNACK, J., and MAY, J., concur.